

Taylor v. Shelton, 76979/16

April 19, 2017

- Civil Court, Kings County, Housing Part D
- 76979/16
- Judge Maria Ressos
- For Plaintiff: Petitioner's Attorney: Bradley M. Zelenits, Esq., Zelenitz, Shapiro & D'Agostino, P.C., Briarwood, NY.
- For Defendant: Respondent's Attorney: Vince Chan, Esq., Queens Legal Services, Jamaica, NY.

Cite as: Taylor v. Shelton, 76979/16, NYLJ 1202783907203, at *1 (Civ., KI, Decided March 22, 2017)

DECISION/ORDER

*1

Respondent moves herein for an order pursuant to CPLR §§3211 (a)(2) and/or (7) dismissing this holdover proceeding on the basis that Petitioner failed to allege Respondent's Section 8 status in the predicate notice and the petition, failed to serve copies of either on the New York City Housing Authority (hereinafter "NYCHA") and that Petitioner vitiated the termination notice by accepting rent payments from NYCHA after the termination date. Respondent additionally moves pursuant to CPLR §2004 and §3012(d), for an order granting her leave to serve and file the proposed answer annexed to the motion and for an award of reasonable legal fees, costs and disbursements.

Petitioner commenced the instant hold over proceeding to recover possession of the subject free market apartment occupied by the tenant by service of a notice of petition and petition on Respondent on November 16, 2016. Prior to this, Petitioner served a thirty day notice of termination on Respondent on September 8, 2016 terminating the month to month tenancy effective October 31, 2016. The affidavit of service for the thirty day notice indicates that it was left at the premises with an individual identified as Diane Shelton and mailed to the Respondent. The case first appeared on the calendar on November 23, 2016 and was adjourned to January 11, 2017 for Respondent to seek counsel. Respondent failed to appear on January 11, 2017 and therefore the case was adjourned to February 9, 2017 for an inquest and for the court to send a post card to Respondent. Due to a snow storm, it was adjourned to March 9, 2017 at which time Queens Legal Services appeared on behalf of the respondent and interposed the instant pre-answer motion.

CPLR §3211 (a)(1) provides in pertinent part; "A party may move for judgment dismissing one or more causes of action asserted against him on the ground that "(1) a defense is founded on documentary evidence; or (2) the court has not subject matter jurisdiction of the cause of action; or...(7) the pleading fails to state a cause of action; "McKinney's Cons. Laws of NY CPLR §3211.

Petitioner in opposition to the motion argues that the motion should be denied as a copy of the termination notice was personally served on the Section 8 Leased Housing Unit. A copy the termination notice dated September 8, 2016 bearing the stamp "Received September 21, 2016 Leased Housing Dept. *2 Eviction Unit" is annexed as an exhibit to the opposition papers as proof of service.

Petitioner does not address the issue of service of the notice of petition and petition on NYCHA, nor does she annex a similarly stamped copy of the notice of petition and petition to the opposition papers. There are no affidavits of service annexed to the notice of petition and petition or the termination notice indicating that any of these papers were in fact served upon Section 8, when they were served and the manner of service.

The courts have repeatedly held that private landlords participating in the Section 8 subsidized rental program or with Section 8 tenants must follow the procedures set forth in the Williams Consent Decree when serving the NYCHA. See Newshan v. Cruz, 72232/12 N.Y.L.J., 1202580061029*1 (Civ. Ct. Queens Cty. decided November 23, 2012); 433 W. Assoc. v. Murdock, N.Y.L.J. October 23, 200 at page 22 col. 3 (A.D. 1st Dept.); Alawlaqi v. Kelly, 175 Misc. 2d 570, (Civ. Ct. NY). The Williams Consent Decree as well as the Code of Federal Regulations (hereinafter "CFR") provide that a landlord must serve upon the tenant as well as the public housing authority (hereinafter "PHA") i.e. NYCHA in this case, a copy of the notice of termination and the notice of petition and petition no later than the time that these documents are served on the tenant. 24 C.F.R. §982.310 (e)(2)(ii); see also Williams v. New York City Housing Authority. 81 Civ. 1801 (S.D.N.Y. 1995). The notice must be served in compliance with the lease and state and local law. 24 C.F.R. §982.310 (e)(2) (I). Failure to serve copy of the termination notice on NYCHA is a jurisdictional defect warranting dismissal of the petition. As this is dispositive, the Court declines to address the other arguments raised by Respondent.

In the absence of a proper affidavit of service from the process server attesting to service of the termination notice and the notice of petition and petition on NYCHA in accordance with the Williams Consent Decree and the CFR, the Court must dismiss the petition.

Accordingly, Respondent's motion to dismiss the proceeding is hereby granted and the proceeding is dismissed without prejudice. As the proceeding is being dismissed, Respondent's request to serve and file the proposed answer is denied as moot. While Respondent was successful in having this proceeding dismissed making her the prevailing party, this dispute has not reached an "ultimate outcome" therefore, Respondent's request for attorneys fees is denied.

Respondent shall serve a copy of this order with notice of entry upon the petitioner within ten (10) days.

This constitutes the Decision and Order of the Court.

Dated: March 22, 2017

Queens, New York

